IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 92 OF 2003

Mr. Vishnu Govind Naik,
Major of age,
Married,
Resident of Deulwada,
Harmal,
Pernem, Goa. ... Appellant

versus

1. Mr. Harischandra
   Dattaram Thakur,

2. Mrs. Taramati
   Harischandra Thakur,

   Both of major ages,
   Married,
   Residents of Deulwada,
   Harmal,
   Pernem, Goa. ... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Ms. S. Naik, Advocate for the Appellant.

Mr. M. S. Sonak, Advocate for the Respondents.

CORAM : N. A. BRITTO, J.

DATE : 5TH MAY, 2006.

J U D G M E N T

This is plaintiff's second appeal arising from R.C.S. No.16/98.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. Broadly stated, there is a property known as "Gawthan" having land registration No.1061 which belonged to the family of Francisco Xavier Carmo Vaz and his wife Maria Peres Vaz and which property subsequently came to be surveyed under survey nos. 24/1 and 25/3. The family of the plaintiff had their house in survey no.24/1 and that of defendant in survey no.25/3. The defendant has been subsequently declared as a mundkar in respect of the said house. The dispute between the parties is as regards an open space which according to the plaintiff is about 50 sq. meters and, admittedly in the said 50 sq. meters the defendant had a cowshed and cow dung pit, and was encircled by a fence made of shrubs. The plaintiff's father by Sale Deed dated 10-9-1934 purchased 1/6th part of the said

property while the defendant by Sale Deed dated 23-5-1988 purchased the remaining share from the daughter of the said Francisco Xavier Carmo Vaz. It appears that there was a dispute as regards the said open space previously between the defendant and one Sada Bala Thakur and the defendant was held to be in actual possession of the said space by the Sub-Divisional Magistrate, Panaji in Chapter Proceedings No.MAG/RS Case No.769.

4. The plaintiff claiming that what his father had purchased, namely 1/6th part of the said property, having been surveyed under no.24/1 of Arambol village, filed the suit for permanent injunction to restrain the defendant from doing any construction or interfering in the suit property and also to demolish the illegal construction carried out by the defendant and also for the declaration that the Sale Deed dated 24-5-1998 be declared null and void.

5. The case of the plaintiff was that the plaintiff was the owner of 1/6th part from the suit property and there are other owners according to their share and their names were recorded

in the Occupants Column and besides there were houses and other structures such as cowsheds which were recorded in the survey records and the persons who are the owners, their names have been recorded in the Occupants Column and the suit property was not divided amongst the owners and it was enjoyed in common. The case of the plaintiff was that he had his residential house and a cowshed and there were 11 structures of other co-owners including the houses and cowsheds. As per the plaintiff, during the life time of his father, the defendant was allowed to erect a cowshed on four pillars and besides that the defendant had no right of whatsoever nature in the said property. Plaintiff claimed that the said open space was in his possession and the plaintiff had planted some live fencing trees all along the side of the said open space and on the northern side there was a cowshed of the defendant beyond which there was a PWD public road and that the plaintiff was in possession and enjoyment of his house and the said open space in the suit property in addition to other area all around the plaintiff's house since its purchase in the year 1934, firstly through his father and after his death through himself and neither the defendant nor any other co-owner ever had claimed nor had interfered in the

said open space at any point of time. The case of the plaintiff is that the defendant in January, 1988 tried to cut the said fence which was all around the said open space and later tried to dig the said open space and that on or about 1-5-1998 the defendant dug trenches and completed the foundation work regarding which he filed a complaint to the Village Panchayat. The case of the plaintiff was that the defendant had no right or interest in the suit property except the use and occupation of the cowshed; that the suit property was a common property of all co-owners and the same was not partitioned among other co-owners of the suit property and the defendant was neither the co-owner nor had any right in the suit property and was doing the said illegal construction. The plaintiff, by amendment, further stated that the vendor of the defendant had no right to sell the share of the plaintiff to the defendant and the said Sale Deed was prima facie illegal.

6. The defendant denied that the suit property was not divided amongst the owners or that it was enjoyed in common. The defendant stated that his cowshed existed in the suit property for more than 50 years prior to the Liberation of Goa

and the defendant had constructed a pucca house in the suit property by obtaining a licence from Pernem Municipal Council under No.37 dated 14-2-1969 in the name of his sister Sitabai S. Porob and that the defendant shifted the cowshed from the southern side to the northern side and at the original place of the cowshed the defendant has been storing haystack. The defendant denied that there was open space in possession of the plaintiff. The defendant stated that the said open space was in possession and enjoyment of the defendant and the defendant stated that his construction was lawful and was done in the existing plinth area of the old structure belonging to the defendant, having the old licence for construction issued under No.37 dated 14-2-1969 issued in the name of his sister and that he reconstructed the same on the existing plinth area with necessary permission from the Village Panchayat after complying with all statutory formalities. The defendant also stated that he had purchased the suit property excluding the structures belonging to other co-owners, from the bhatkars, the erstwhile owners and that in the entire suit property, the alleged 1/6th part of the plaintiff admeasured about 1239 sq. meters which the defendant showed on a sketch and in support of the same the

defendant examined Engineer Tuyenkar/DW4. It was defendant's case that though the suit property was surveyed in common all the interested persons have amicably partitioned the suit property and exclusively and independently enjoying the portion allotted to them. The defendant stated that the plaintiff is in possession of the area as per his share and the defendant purchased the remaining share in the entire property.

7. After issues were framed, the learned Civil Judge by Judgment/Order dismissed the suit. In dismissing the suit, the learned trial Court came to the conclusion that the suit property was divided. The learned trial Court observed that the fact that the said Francisco Xavier Carmo Vaz and his wife sold 1/6th part of the suit property implied that the suit property was not common but the shares of the co-owners were determined legally and the suit property was partitioned amongst the co-owners and accordingly the said Shri Francisco Xavier Carmo Vaz and his wife had sold a separated and partitioned plot of his 1/6th share in the suit property and after the said sale the plaintiff's father became the exclusive owner of the same. The learned trial Court rejected the plaintiff's contention that the property was common

and the same was contrary to plaintiff's own case when he came to the Court with a plea that his father had purchased 1/6th part of the same. The learned trial Court, as regards the said open space claimed by the plaintiff, observed that the said claim of the plaintiff was contrary to the story of undivided and common suit property propounded by the plaintiff and was also contrary to his evidence and that the evidence showed that the said open space was not in possession of the plaintiff but was in possession of the defendant. As regards the house constructed by the defendant, the learned trial Court came to the conclusion that the construction was carried out on the existing plinth area of the old structure belonging to the defendant.

8. The plaintiff carried an appeal to the District Court and the learned Additional District Judge by his Judgment/Order dated 10-9-2003 dismissed the same with costs. In dismissing the appeal, the learned ADJ approved all the findings given by the learned trial Court except that the learned ADJ held that the suit property was not divided or partitioned but it was not enjoyed in common but was enjoyed in portions independently.

9. This second appeal was admitted by Order of this Court dated 15-1-2004 on a substantial question of law which reads as follows:-

> "Whether, assuming that the Respondents were co-owners of the suit property, construction carried out by them could be said to be legal in the absence of any pleas that it was done with the consent of the appellant?"

10. The plaintiff has also filed an application dated 20-4-2006 under the proviso to Section 100 C.P.C. raising some additional substantial questions, and it is contended on behalf of the defendant that the substantial questions framed nor the questions sought to be raised by application dated 20-4-2006 are substantial questions of law.

11. Mr. S. D. Lotlikar, the learned Senior Counsel on behalf of the plaintiff, has submitted that the learned ADJ has held that the suit property is common and undivided and the defendant has also admitted that the property was still common amongst the plaintiff and 6 others and, therefore, the defendant

even if he was a co-owner could not have carried out a construction without the consent of the other co-owners. It is further submitted that the parents of the seller of the defendant had already sold their share to the plaintiff and, therefore, the defendant's seller namely, the daughter of the erstwhile sellers, had no share to be sold to the defendant. Mr. Lotlikar has next submitted that there was no existing structure and, therefore, any finding given in that regard by both the Courts below has got to be considered as perverse. Referring to Article 1270 of the Civil Code, Mr. Lotlikar has submitted that the plaintiff being a co-owner of the suit property and even assuming that the defendant is another co-owner, the defendant without the consent of the plaintiff could not have constructed or reconstructed the said house without the permission of the plaintiff.

12. On the other hand, Mr. M. S. Sonak, the learned Counsel on behalf of the defendant has submitted that what was sold to the plaintiff was 1/6th part which clearly indicated that there were other parts which remained with the said sellers of the plaintiff and what the defendant purchased was the share

left with them and which their daughter, the seller of the defendant inherited subsequently.

13. Mr. Lotlikar, the learned Senior Counsel has submitted that the said sellers of the plaintiff had also sold their other shares in favour of the other persons who had their houses in the suit property and, therefore, the seller of the defendant could not have any share to inherit from his parents who were sellers of the plaintiff.

14. Mr. Sonak has submitted that it was for the plaintiff to prove to what extent his 1/6th part extended and the plaintiff having not come with the case of co-ownership but having come with the case of exclusive possession of the said disputed area/open space and having failed in the same the suit of the plaintiff ought to have been dismissed and it has been rightly dismissed. Mr. Sonak has submitted that the property is divided by metes and bounds and is enjoyed as such by different owners who have separately purchased the same from the erstwhile owners, the sellers of the plaintiff, and the remaining share has now been purchased by the defendant and, therefore, under no

circumstances the suit could have been decreed. Mr. Sonak has further submitted that even if plaintiff is held to be a co-owner and the defendant the other co-owner of the suit property then the defendant was entitled to reconstruct on an existing construction and in support of the said submission Mr. Sonak has referred to the observation of the Supreme Court in the case of **T. Lakshmipathi and others** v. **P. Nithyananda Reddy and others**((2003) 5 SCC 150) wherein the Supreme Court observed that one co-owner cannot take exclusive possession of the property nor commit an act of waste ouster or illegitimate use, and if he does so he may be restrained by an injunction. A co-owner may, by an arrangement, express or implied, with his other co-owners, possess and enjoy any property exclusively. Such a co-owner can also protect his possession against the other co-owners and if he is dispossessed by the latter, he can recover exclusive possession. The said observations are based on what the Supreme Court stated, speaking through four learned Judges in **Jahuri Sah** v. **Dwarika Prasad Jhunjhunwala**(AIR 1967 SC 109):

> "Co-owners are legally competent to come to any kind

> of arrangement for the enjoyment of their undivided property and are free to lay down any terms concerning the enjoyment of the property. There is no principle of law which would exclude them from providing in the agreement that those of them as are in actual occupation and enjoyment of the property shall pay to the other co-owners compensation".

15. In the case of **Mukund Balkrishna Kulkarni** v. **Kulkarni Powder Metallurgical Industries and another**((2004) 13 SCC 750) the Supreme Court observed that the inclusion of the words "perverse" and "interpretation" in the questions did not give a licence to the High Court to in fact sit in appeal and reappraise the entire evidence as if it were sitting as a Court of first appeal. The High Court could not have disturbed the finding, without demonstrating that the conclusion was such that it was wholly irrational or was arrived at without taking into consideration matters which were relevant or that the conclusion was based upon legally inadmissible or irrelevant evidence.

16. The findings that the defendant was in possession of the disputed portion of the suit property and the defendant had

carried out a reconstruction are findings of facts given by both the Courts below and they are based on evidence and being so it is not permissible for this Court to interfere with the same in this limited jurisdiction. Indeed, the Supreme Court in a recent Judgment has stated that "the High Court would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions of law have been formulated in the memorandum of appeal... . It must be clearly understood that the legislative intention was very clear, that it never wanted second appeal to be third trial on facts or one more dice in the gamble".(2006 SCW AIR 2404)

17. In the case of **Jose Caetano Vaz** v. **Julia L. L. Fernandes**(AIR 1969 G. D.D. 90), the learned Additional Judicial Commissioner stated that a co-owner, though in possession of the joint property, has no right to change the user of that property without the consent of the other co-owners, and that if the aggrieved co-owner comes to the Court with due promptness for restraining the defendant from raising a building on the joint property, the Court can very legitimately decree prohibitory

injunction, and if in the meantime any structure has been raised a decree for mandatory injunction can also be granted. In another case cited on behalf of the plaintiff(Appeal From Order No.44/90 dated 30-7-1991 **Shri Datta Laxman Naik and another** v/s **Shri Damodar Laxman Naik and others**) this Court observed that merely because one co-owner uses a particular part of a common property exclusively that by itself makes no difference nor can it mean that he has no right to the other parts of the property.

18. There can be no dispute with the proposition that under the law every co-owner of undivided property is entitled to enjoy the whole of the property. In other words, one co-owner cannot take exclusive possession of the property nor commit an act of waste, ouster or illegitimate use, and if he does so he may be restrained by an injunction. Although, the learned ADJ observed that the suit property was common and undivided the learned ADJ, in no uncertain terms held that the suit property was not divided or partitioned but was not commonly enjoyed and was enjoyed in portions independently. The plaintiff's father purchased by Deed dated 10-9-1934 1/6th part of the entire

property having land registration No.1061 at pages 494 of Book B4 for a sum of Rs.100/- where exists a residential house of the purchaser. According to the plaintiff the said 1/6th part purchased by his father was surveyed under no.24/1 of Arambol village and which he described as the suit property and at the same time the plaintiff also pleaded that apart from the plaintiff who is the owner of 1/6th part of the suit property there are other owners according to their share and their names are recorded in the Occupants Column in the survey records. The plaintiff pleaded that the said open space admeasuring about 50 meters was in his exclusive possession but in his evidence stated that it was common and was enjoyed by all the co-owners and the findings given by both the Courts below is that the said open space has been in possession of the defendants. It was not the case of the plaintiff that the said open space was part of 1/6th part where he has his house purchased by him of the suit property(S.No.24/1) of which he was the owner as well. The pleadings of para 2 of the plaint make it abundantly clear that the plaintiff is the owner of the said 1/6th part and there can be no dispute about it and so also there are other owners in the suit property who have purchased their respective houses and/or area

surrounding them from the vendors of the plaintiff. In cross-examination, the plaintiff admitted that there were 8 houses in the suit property out of which 7 were existing and one Babu Ramchandra Thakur constructed a house. He has referred to the said persons who have their houses namely, Shivram Anant Naik, Vishnu Laxman Thakur etc. as owners of the property. The plaintiff stated that when Babu R. Thakur constructed the house he did not object to the same. One Apa Rao Naik also constructed a house in the suit property and the plaintiff nor the other owners who have their of the houses and who have purchased them from the vendors of the plaintiff, objected to the said construction and when the plaintiff was questioned as to why he was objecting to the construction by the defendant, the plaintiff stated that he had not taken any objection because they had constructed their houses at a long distance. In other words, the plaintiff if he is a co-owner of the suit property he has no objection if anyone else constructs houses in the suit property but only the defendant should not be allowed to construct because defendant was constructing close to his house. The principle of co-ownership apart from the so-called admission of the defendant is not at all applicable to the facts of the case and

it is being raised for the first time before this Court. As already stated it was not the case of the plaintiff that his father had purchased the said open space when his father purchased 1/6th part where his father had his house. The case of the plaintiff was that he was in exclusive possession of the said disputed portion which stand he changed subsequently by stating that he was in possession of the same with other co-owners and the findings of the Courts below is that it is defendant who was in exclusive possession of the said disputed portion which accordingly the plaintiff admeasured about 50 meters. At this stage, it may be noted that at the instance of the plaintiff the Court by Order dated 23-1-2002 had ordered the seller of the defendant, and her husband, to be made parties to the suit but the plaintiff chose not to bring them on record as a result of which the plaintiff has failed to challenge the validity of the Sale Deed executed in favour of the defendant, as regards the share of the daughter of the sellers of the plaintiff in respect of the entire property, having the said two sub-divisions. For the first time before this Court that the plaintiff has claimed in this second appeal that what the plaintiff purchased was 1/6th undivided part of the suit property by Sale Deed dated 10-9-1934. In case the plaintiff had

purchased 1/6th undivided part of the said property then only the plaintiff's father and later the plaintiff would have been co-owners of the suit property and in that event the principle of co-ownership as well as Article 1270 of the Civil Code could have been invoked to restrain the defendant, another co-owner, from constructing in a common undivided property. The observation of the learned ADJ that the suit property is not divided or partitioned has to be understood in the context of the facts of the case. It was not the case of the plaintiff that his father had purchased an undivided right in the entire property having Land Registration number 1061. The case of the Plaintiff, as Sale Deed dated 10-9-1934 shows, was that the plaintiff's father had purchased 1/6th part where there was their residential house. In other words plaintiff's father had purchased an identifiable part and not an undivided share in the entire property. So did the other mundkars who had their respective houses. Thus they became owners of parts purchased by them where they had their houses. This is clearly set out by the plaintiff in para 2 of the plaint and spelt out from the evidence of the plaintiff. Plaintiff as owner of the part purchased by him had no right or interest in the parts purchased by others. Likewise, the others who

purchased the houses with surrounding areas had no right in the part purchased by the plaintiff. The plaintiff and others were owners of distinct parts of the same property and in that sense they were co-owners of the same property which was otherwise not divided. They were not co-owners in the sense that they had right or interest in one another's parts. In other words, they did not enjoy the property as joint property and in such a situation the principle that one co-owner has no right to change the user of the property without consent of others cannot be applied to the facts of the case at hand. The property might have not been divided but what the plaintiff and others who had their houses in the said property of the erstwhile owners purchased from them were distinct parts where they had their houses and if at all the defendant admitted in his evidence that the property was not divided, the said admission of the plaintiff, is of no assistance to the case of the plaintiff at all, the plaintiff having not pleaded that the plaintiff's father had purchased an undivided right of the suit property. The plaintiff had purchased a distinct 1/6th part where his house existed and as such the plaintiff could claim no right in the remaining property either surveyed under no.24/1 or for that matter 25/3. It is certainly not the case of

the plaintiff that he is the co-owner of the parts purchased by the other owners who had their houses namely, Suryaji Thakur, Gunaji Thakur etc. but he is the owner only of the said 1/6th part where his house stands and it is for this reason that the plaintiff did not object, and so did the other owners, when the said Babu R. Thakur and Apa R. Naik constructed their houses. When the plaintiff claims to be a co-owner he could be considered to be only one of the owners of the suit property having no right or interest in the ownership rights acquired by others and in this view of the matter the principle of co-ownership as generally understood could not be extended to the facts of the case at hand to injunct the defendant who had also acquired right to the suit property by virtue of the said Deed dated 23-5-1988, from carrying out the construction. In my view, the learned trial Court having come to the conclusion that the property was not enjoyed in common and the defendant was in possession of the portion claimed by the plaintiff had rightly dismissed the suit. In this view of the matter, the question framed nor the questions sought to be raised which I have refrained from reproducing in this Judgment with a view not to lengthen the same, arise in this second appeal. At the cost of

repetition, it may be reiterated that the case that the plaintiff is the owner of 1/6th undivided part, which is not reflected by the Sale Deed nor by the pleadings of para 2 of the plaint, has been raised for the first time before this Court. A question to be a substantial question, as observed by the Supreme Court in the case of **Santosh Hazari** v. **Purushottam Tiwari**(AIR 2001 SCC 165) must have foundation in the pleadings and must have material bearing on the outcome of the case. That is not the case at hand.

19. In my view, there is no merit in this second appeal and, therefore, the same is hereby dismissed with costs throughout by the plaintiff.

N. A. BRITTO, J.

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